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www.regulations.gov

CC:PA:LPD:PR (REG-110136-07)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Proposed Amendments to Treasury Regulation § 54.4980F-1

Dear Friends,

The National Coordinating Committee for Multiemployer Plans (the NCCMP) is pleased to submit these comments on the proposed amendments to Treasury Regulation § 54.4980F-1, regarding the application of ERISA § 204(h) and Internal Revenue Code (IRC) § 4980F[1] to the benefit restrictions and reductions authorized or imposed by the Pension Protection Act of 2006 (the PPA), among other matters.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer benefit plans for defined benefit retirement, and the approximately twenty-six million active and retired workers and their dependents who receive their health and other benefits from these plans. Our purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit organization, with affiliated plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail food, trucking and service and entertainment industries.

The NCCMP appreciates your streamlining the potentially unwieldy notice regime by proposing that the 204(h) notice requirements be folded into the specific notice requirements prescribed by PPA for benefit reductions that are authorized or required by PPA. Our comments reflect some operational questions about how that would work, especially in connection with reductions in benefits, pursuant to IRC § 432(e), under multiemployer pension plans that are in critical status.

[1] For ease of reference, these comments refer to these sections collectively as "§ 204(h)", and the notices that they require as "204(h) notices".

1. Combining Notices: Sanctions

Further clarity is needed on which sanctions apply in the case of a defective notice. The proposal states that a plan will be deemed to satisfy the 204(h) notice requirements if it satisfies the specific notice requirement applicable to the benefit reduction. For a critical-status multiemployer plan, that would be IRC § 432(e)(8)(C). We believe that the consequences of failing to give adequate, timely notice under § 432(e) of a reduction in adjustable benefits should be those that Congress designed to enforce that section, including the excise taxes under § 4971(g) for failure to meet the standards of the applicable rehabilitation plan. The result for a plan that mishandles benefit reductions that are necessary for its financial recovery could be cataclysmic. Nothing but anxiety could be gained by piling the § 4980F excise tax on top.

Moreover, some 432(e) failures would not, on their own, be 204(h) failures. For example, a notice given 20 days before the effective date of the benefit reduction would satisfy § 204(h) but not § 432(e). Presumably the plan amendment in such a case would be effective for reducing the rate of future benefit accruals, but not for reductions in benefits that can only be cut back in compliance with § 432(e). Similarly, an amendment reducing early-retirement subsidies of terminated vested participants would need a 432(e) notice but not a § 204(h) notice, since it does not affect accruals or benefit rights to be earned in the future. In these cases, certainly, it would be inappropriate to impose a 204(h)/4980F sanction.

2. Distinguishing 204(h) Events under § 432(e)

By saying that § 204(h) is satisfied by giving a statutory notice, the proposal sidesteps the need to determine which benefit changes under § 432(e) are subject to § 204(h). However, it is important to make clear what is and is not required, both for critical-status plans and when analogous questions come up.

For example, the final regulation should point out that a 204(h) notice is required when a critical-status plan is amended to reduce the rate of future benefit accruals or related features, just as with endangered plans. It also follows that a § 432(e) notice is not required unless adjustable benefits are being reduced or eliminated, even if the plan is in critical status.

It would also be useful for the regulation to confirm that a critical-status plan's compliance with the statutory ban on lump-sum and related payment forms under IRC § 432(f)(2) is not an event that requires either a 204(h) notice or a 432(e) notice. That constraint on participants' benefit rights is not imposed by a plan amendment adopted by the trustees as part of their rehabilitation plan and it may be only a temporary limitation that will be lifted when the plan recovers. By contrast, the rehabilitation plan may include an amendment permanently eliminating these or other benefit payment forms among other adjustable benefits (see § 432(e)(8)(A)(iv)(II)), in which case § 432(e) would require advance notice. However, that notice would not be required until such an amendment is approved, which will usually be after the payment restriction goes into effect.

3. Conditional Notices: Timing

Section 432(e)(8)(C) requires that notice of a reduction in adjustable benefits be given "at least 30 days before" the reduction takes effect. Sections 204(h) and 4980F require that notice be given "within a reasonable time before" amendment takes effect. For multiemployer plans, that translates into a requirement that notice be provided "at least 15 days before" the effective date, Treas. Reg. § 54.5980F-1, Q&A 9(c).

Thus the law and regulations require that these notices be given no later than the stated deadlines. They do not limit how much before the effective date of the amendment the notices may be given. This is in sharp contrast with IRC § 417(a)(6), which prescribes the applicable election period for qualified joint and survivor annuities: an election given before the start of that period is invalid, just as one given after the deadline may be invalid.[2]

The NCCMP urges the Treasury and IRS to confirm, in the final amendments to the § 4980F regulation, that there is no specific limit on how far in advance of the effective date of the benefit-reduction amendment the 204(h) and 432(e) notices may be provided. Once they have developed the schedules of benefits and contributions that will be provided to the bargaining parties, plans in critical status will often want to adopt amendments that reduce benefits automatically once a group agrees to a schedule. For that to happen, the plans will need to notify all of their participants before bargaining begins, about the options that are being offered for negotiation and the consequences of the various choices. This may be the only practical way to make sure participants know what is at stake and to give them adequate advance legal notice, particularly for a large plan with many contributing employers whose bargaining agreements coming up for renewal throughout the year.

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We appreciate your consideration, and will be pleased to provide any additional information in this connection that you would find useful.

Sincerely,

Randy G. DeFrehn
Executive Director

[2] Subject, of course, to the conditions in § 417(a)(7).